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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

v.

APPLE INC.,

Defendant, Counterclaimant.

No. 4:20-CV-05640-YGR-TSH

**DECLARATION OF J. WESLEY
EARNHARDT IN SUPPORT OF
PLAINTIFF EPIC GAMES, INC.'S
OPPOSITION TO DEFENDANT
APPLE INC.'S MOTION FOR PRE-
TRIAL SANCTIONS**

Date: April 13, 2021, 2 p.m.

Courtroom: 1, 4th Floor

The Honorable Yvonne Gonzalez Rogers

DECLARATION OF J. WESLEY
EARNHARDT

CASE No. 4:20-cv-05640-YGR-TSH

1 I, J. Wesley Earnhardt, declare as follows:

2 1. I am an attorney licensed to practice in the State of New York and admitted to
3 appear before this Court *pro hac vice* in *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-
4 YGR-TSH. I am a partner at the law firm of Cravath, Swaine & Moore LLP and am one of the
5 attorneys representing Epic Games, Inc. (“Epic”) in the above-captioned action.
6

7 2. I submit this declaration in support of Epic’s Opposition to Apple Inc. (“Apple”)’s
8 Motion for Pre-Trial Sanctions Against Epic in this matter. (Motion for Pre-Trial Sanctions, ECF
9 No. 419.) The contents of this declaration are based on my personal knowledge except as to
10 matters stated on information and belief. As to those matters stated on information and belief, I
11 am informed and believe them to be true. If called to be a witness, I could and would testify
12 competently to the contents of this declaration.
13

14 3. A true and correct copy of Apple’s Initial Disclosures, served on October 12,
15 2020, is attached hereto as **Exhibit A**.

16 4. A true and correct copy of Apple’s First Amended Initial Disclosures, served on
17 February 10, 2021, is attached hereto as **Exhibit B**.

18 **FACT DISCOVERY PERIOD.**

19 5. During the fact discovery period, Epic served document subpoenas on 24 third-
20 party entities, including on Facebook, Inc. (“Facebook”), Microsoft Corporation (“Microsoft”)
21 and Yoga Buddhi Co. (“Yoga Buddhi”).
22

23 6. I am informed and believe that Apple served document subpoenas on at least 26
24 third-party entities, including on Facebook, Microsoft and Yoga Buddhi.

25 7. In response to those subpoenas, the third-party entities produced documents to
26 both Epic and Apple. Epic provided all third-party productions it received in response to its
27 subpoenas to Apple.
28

1 8. I am informed and believe that Microsoft produced 79 documents in response to
2 Epic's and Apple's document subpoenas, with Bates stamps MSFT_EPIC_000000001 to
3 MSFT_EPIC_00008099.

4 9. I am informed and believe that Yoga Buddhi produced 189 documents in response
5 to Epic's and Apple's document subpoenas, with Bates stamps DOWNDOG-EPIC_00001 to
6 DOWNDOG-EPIC_00293.

7 10. I am informed and believe that Facebook produced 1,677 documents in response to
8 Epic's and Apple's document subpoenas, with Bates stamps EGFB-000001 to EGFB-011755.

9 11. During the fact discovery period, Epic, Apple and the class plaintiffs in the related
10 actions engaged in negotiations regarding the number of third-party depositions. I personally
11 participated in these negotiations.

12 12. As part of these negotiations, Epic proposed allotting to each side a set number of
13 hours to use to depose third parties, instead of a set number of depositions. Epic first proposed
14 100 hours and later reduced this number to 70 hours. Epic made this proposal because of the
15 large number of third parties that had been disclosed on each party's initial disclosures and
16 subpoenaed for documents, and the need to be able to depose any third party that Apple could call
17 as a witness at trial.

18 13. Apple rejected Epic's proposal and proposed the parties agree to a specific number
19 of third-party depositions. Epic explained its concern that a set number of depositions would
20 result in a risk that the other party would call a witness to testify at trial that had not yet been
21 deposed. Apple agreed to a condition that any third-party witness who appeared on the other
22 side's witness list could be subject to a deposition prior to trial if that witness had not previously
23 been deposed. Epic agreed to Apple's proposal to limit the number of third-party depositions to
24 three per side based on that pre-trial deposition procedure. Apple memorialized this agreement
25
26
27
28

1 on January 22, 2021 in an email to Epic. A true and correct copy of email correspondence from
2 Apple's counsel to me and other counsel to Epic, counsel to Apple and counsel to the class
3 plaintiffs in the related actions is attached hereto as **Exhibit C**.

4 14. Apple did not raise the issue of additional document discovery for these pre-trial
5 depositions during any of these negotiations, and the parties did not agree to additional document
6 discovery after the discovery cutoff.

7 15. The parties deposed two true third parties—Nvidia Corporation (through its
8 designated corporate representative Aashish Patel, Director of Product Management) and Adrian
9 Ong, a senior executive of Match Group, Inc.—before the close of fact discovery. I am informed
10 and believe that Apple did not request an additional custodial document production from either
11 witness before taking their depositions.

12 **COURSE OF DEALING WITH MICROSOFT.**

13 16. Since at least November 2020, Epic has been in discussions with Microsoft
14 concerning whether Microsoft would be willing to offer a trial witness. Epic asked Microsoft on
15 numerous occasions if it would agree to make a witness available at trial. Although Microsoft
16 indicated it was willing to consider doing so, Microsoft did not disclose the name of whom it
17 might offer until March 12, 2021. On March 5, 2021, Epic inquired whether Lori Wright, Vice
18 President of Xbox at Microsoft, would be willing to testify, in light of her direct interactions with
19 Apple regarding Microsoft's cloud gaming service, which Epic had seen in documents produced
20 by Apple. Microsoft informed Epic that Ms. Wright was a potential candidate but did not commit
21 to making Ms. Wright available for trial at that time.

22 17. Epic learned of Ms. Wright from reviewing Apple's document productions. I am
23 informed and believe that Apple's production includes over 330 documents that were, at least in
24 part, sent to or received by Ms. Wright.

1 18. Microsoft did not confirm to Epic that it was willing to make Ms. Wright available
2 as a trial witness until the morning (PT) of March 12, 2021. Epic disclosed Ms. Wright to Apple
3 at 8:31 p.m. (PT) on that same day in its Tentative Witness List. A true and correct copy of the
4 email correspondence from Epic's counsel to Apple's counsel serving Epic's Tentative Witness
5 List is attached hereto as **Exhibit D**. A true and correct copy of Epic's Tentative Witness List is
6 attached hereto as **Exhibit E**.

7
8 **COURSE OF DEALING WITH YOGA BUDDHI.**

9 19. On March 5, 2021, Epic inquired whether Benjamin Simon, Co-Founder and CEO
10 of Yoga Buddhi, would be willing to accept a trial subpoena to testify in this matter. Epic learned
11 that Mr. Simon would be willing to accept a trial subpoena on March 8, 2021. Epic disclosed
12 Mr. Simon to Apple on March 12, 2021 in its Tentative Witness List.

13
14 20. Yoga Buddhi's document production in this action revealed that Mr. Simon was
15 the individual at Yoga Buddhi directly interacting with Apple. It is my understanding that every
16 document produced by Yoga Buddhi in this case either involves Mr. Simon directly or relates to
17 an operation of Yoga Buddhi that Mr. Simon controls.

18 **THIS DISPUTE.**

19 21. After Epic served its Tentative Witness List, Apple served notices of deposition
20 subpoenas on Epic for depositions of Ms. Wright and Mr. Simon.

21
22 22. A true and correct copy of the Notice of Deposition Subpoena on Ms. Wright,
23 dated March 19, 2021, is attached hereto as **Exhibit F**.

24 23. A true and correct copy of the Notice of Deposition Subpoena on Mr. Simon,
25 dated March 19, 2021, is attached hereto as **Exhibit G**.

26 24. It is my understanding from conversations with Apple and Microsoft that
27 Microsoft offered April 16, 2021 as the deposition date for Ms. Wright. It is my understanding
28

1 from conversations with Yoga Buddhi that Yoga Buddhi offered April 14, 2021 as the deposition
2 date for Mr. Simon.

3 25. On April 6, 2021 at 8:13 p.m. (PT), Apple requested a meet and confer for the
4 following day to discuss Epic's witness disclosures and the discovery letter Epic sent to
5 Magistrate Judge Hixson (ECF No. 398) in response to the Joint Discovery Letter Regarding
6 Apple's Subpoenas to Non-Party Facebook, Inc. (ECF No. 395). Epic agreed to meet and confer,
7 and the parties met telephonically on April 7, 2021.

9 26. During the April 7, 2021 meet and confer, Apple informed Epic for the first time
10 that Apple claimed Epic's initial disclosures were deficient. Also during the April 7, 2021 meet
11 and confer, Apple informed Epic for the first time that it would not proceed with Ms. Wright's or
12 Mr. Simon's depositions. Apple's counsel also informed Epic for the first time during the
13 April 7, 2021 meet and confer that it intended to move to exclude the testimony of Ms. Wright
14 and Mr. Simon.

16 27. During this meet and confer, I asked Apple's counsel about the status of its
17 requests for additional documents from the third parties. Apple's counsel told me that the third
18 parties were refusing to produce additional documents.

19 28. Epic does not in fact have any control over the document productions of
20 Microsoft, Facebook or Yoga Buddhi. Nonetheless, I offered to contact both Microsoft and Yoga
21 Buddhi to understand their positions with respect to additional document discovery. I did not
22 "state[] that Microsoft would not produce any additional documents prior to Ms. Wright's
23 deposition." (See Declaration of Michelle Lowery in Support of Apple's Motion for Pre-Trial
24 Sanctions Against Epic, ECF No. 419-3, ¶ 8.)

26 29. Following the April 7, 2021 meet and confer, I contacted counsel for Microsoft
27 and Yoga Buddhi to discuss the companies' positions with respect to additional document
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